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United States

1412.

Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of SUN DRUG COMPANY, Bankrupt.

R. L. SABIN, as Trustee in Bankruptcy of the
SUN DRUG COMPANY,

Petitioner,

vs.

ACME INVESTMENT COMPANY, a Corporation,

Respondent.

Petition for Revision

Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, an Order of the United States District Court for the District of Oregon.

FILED

DEC 1 1924

F. D. MONKTON,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States Circuit Court of Appeals for
the Ninth Circuit.

In the Matter of SUN DRUG COMPANY, Bank-
rupt.

R. L. SABIN, Trustee in Bankruptcy of the SUN
DRUG COMPANY,

Petitioner,

vs.

ACME INVESTMENT COMPANY, an Oregon
Corporation,

Respondent.

PETITION OF TRUSTEE TO REVIEW UN-
DER SECTION 24-B.

To the Honorable Judges of the Circuit Court of
Appeals for the Ninth Circuit:

Your petitioner, R. L. Sabin, Trustee in Bank-
ruptcy of the Sun Drug Company, Bankrupt, hereby
represents as follows:

I.

That on or about the 23d day of September, 1923,
the Sun Drug Company, an Oregon corporation,
filed its voluntary petition and schedules in bank-
ruptcy in the District Court of the United States
for the District of Oregon, and thereafter on said
date was duly adjudged a bankrupt, and a reference
of said matter was thereupon made to Honorable
A. M. Cannon, Referee in Bankruptcy of said court,
and your petitioner was thereafter elected trustee and
has duly qualified by giving the required bond, which

bond has been accepted and approved, and that your petitioner is the duly qualified, regularly appointed and acting Trustee in Bankruptcy of said Sun Drug Company, bankrupt, and that prior to his qualifications as Trustee he was the duly qualified, regularly appointed and acting Receiver of said bankrupt.

II.

That as such Receiver and as such Trustee of said bankrupt corporation he held the property of the bankrupt in the premises at No. 351 Washington Street, Portland, Oregon, where said bankrupt conducted its business, which premises were the subject of a lease hereinafter referred to between the said Acme Investment Company, respondent herein, and the Sun Drug Company.

III.

That on the 4th day of November, 1923, the Acme Investment Company filed a petition in said estate praying that the Referee in Bankruptcy order and direct the Trustee to pay to it the sum of \$977.60, rental of the premises during the time said Receiver and Trustee occupied said premises.

IV.

That thereupon the Trustee in Bankruptcy herein filed his objection to the said petition of the Acme Investment Company on the ground and for the reason that the Trustee in Bankruptcy, by virtue of his trusteeship of said bankrupt, had a claim against the Acme Investment Company for the sum of \$5,000.00 in cash and for a note of \$1,600.00 and that therefore the Acme Investment Company owed

to the Trustee a sum greater than the Trustee owed to it.

V.

That said claim of \$5,000.00 in cash and \$1,600.00 in a note arose by reason of the fact that the Sun Drug Company, on or about the 15th day of February, 1923, upon entering into a lease of the premises, which it occupied, with the Acme Investment Company, paid to and deposited with the Acme Investment Company the sum of \$5,000.00 in cash and turned over and gave to it a note in the amount of \$1,600.00 in fact and in truth as security for the faithful performance of the covenants of said lease, although in said lease said sum of \$5,000.00 in cash and the promissory note of the Sun Drug Company in favor of the Acme Investment Company in the sum of \$1,600.00 were stated to be the consideration whereby the Lessor, Acme Investment Company, leased said premises to the Sun Drug Company, and that thereafter, on the 28th day of July, 1923, and prior to the bankruptcy of said Sun Drug Company the said Acme Investment Company canceled said lease by a writing directed to and delivered to the said Sun Drug Company, and that by reason of said premises the Acme Investment Company held the said sum of \$5,000.00 in cash and said note of \$1,600.00 of said Sun Drug Company and upon cancellation of said lease at its own volition the said Acme Investment Company was under obligation to deliver back to the Sun Drug Company said sum of \$5,000.00 and said note, and upon its failure so to do, became obligated, upon the bankruptcy of

said Sun Drug Company and the election of your petitioner as Trustee, to said Trustee in said sum of \$5,000.00 and said note.

VI.

That thereafter a hearing was had upon the objection of the Trustee to said petition of the Acme Investment Company, but not upon the merits of the claim for the rental value of said premises during the time the same was occupied by the Receiver and the Trustee herein.

VII.

That after said hearing said matter was taken under advisement by the Referee and after due consideration thereof the said Referee in Bankruptcy on the 14th day of July, 1924, made an order denying said petition and disallowing said claim for rent on the ground and for the reason that said money and note held by the said Acme Investment Company was held as security for the faithful performance of the covenants of said lease and upon the cancellation thereof by the said Acme Investment Company the said moneys and note were held for and on behalf of the Sun Drug Company and after it became bankrupt for and on behalf of said Trustee in Bankruptcy of Sun Drug Company.

VIII.

That thereafter, on the 18th day of July, 1924, the said Acme Investment Company, feeling aggrieved by said order, filed a petition to review said Referee's order.

IX.

That thereafter, on the 29th day of September,

1924, the District Court of the United States for the District of Oregon made an order reversing the said Referee and directing that the Trustee pay the claim of said Acme Investment Company for rent.

X.

All of the foregoing matters will be made to appear more fully to your Honors by a transcript of the record which will be transmitted to this court.

XI.

That said order of the District Court of the United States for the District of Oregon was and is erroneous as a matter of law in that:

(1) Said District Court of the United States for the District of Oregon reversed the said Referee.

(2) The District Court of the United States for the District of Oregon failed to confirm the order of said Referee.

(3) The District Court of the United States for the District of Oregon ordered the Trustee to pay the claim for rent of the premises occupied by the Receiver and Trustee during the period of administration, notwithstanding the fact that no hearing had been had upon the merits of said claim.

WHEREFORE, your petitioner, feeling aggrieved because of said order, asks that the same be revised as provided in Section 24-B of the Bankruptcy Act and the Rules and Practices in such cases made and provided, and that the same be reversed and an order made disallowing the prayer of the petition of said Acme Investment Company, respondent herein, and for such other and further relief as may be just and proper.

Dated at Portland, Oregon, this 7th day of October, 1924.

R. L. SABIN,
Petitioner.

SIDNEY TEISER,
Attorney for Petitioner.

United States of America,
District of Oregon,
County of Multnomah,—ss.

I, R. L. Sabin, being first duly sworn, on oath depose and say that I am the Trustee in Bankruptcy named in the foregoing petition and that the facts set forth therein are true as I verily believe.

R. L. SABIN.

Subscribed and sworn to before me this 7th day of October, 1924.

[Seal]

SIDNEY TEISER,
Notary Public for Oregon.

My commission expires Dec. 27, 1924.

United States of America,
State of Oregon,
County of Multnomah.

Due service of the within Petition to Review is hereby accepted in Multnomah County, Oregon, by receiving a copy thereof duly certified.

BRICE & BRAZELL,
Attorneys for Acme Investment Company, Respondent.

Oct. 9, 1924.

[Endorsed]: In the United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of

Sun Drug Company, Bankrupt. R. L. Sabin, Trustee in Bankruptcy of the Sun Drug Company, Petitioner, vs. Acme Investment Company, an Oregon Corporation, Respondent. Petition of Trustee to Review Under Section 24-B.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

In the Matter of SUN DRUG COMPANY, Bankrupt.

R. L. SABIN, Trustee in Bankruptcy of the SUN
DRUG COMPANY,

Petitioner,

vs.

ACME INVESTMENT COMPANY, an Oregon
Corporation,

Respondent.

NOTICE OF FILING PETITION FOR RE-
VIEW.

To Acme Investment Company and to Brice & Brazzell, Its Attorneys:

You, and each of you, are hereby notified that on the 14th day of October, 1924, at the hour of ten o'clock in the forenoon of said day, we will file in the office of the Clerk of the Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, California, a Petition for Review in the above-entitled cause, a copy of which petition is hereto annexed as a part of this notice.

Dated at Portland, Oregon, this 7th day of October, 1924.

SIDNEY TEISER,
Attorney for Trustee in Bankruptcy.

United States of America,
State of Oregon,
County of Multnomah.

Due service of the within notice is hereby accepted in Multnomah County, Oregon, by receiving a copy thereof duly certified.

BRICE & BRAZELL,
Attorneys for Acme Investment Company, Respondent.

Oct. 9, 1924.

[Endorsed]: In the United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of Sun Drug Company, Bankrupt. R. L. Sabin, Trustee in Bankruptcy of the Sun Drug Company, Petitioner, vs. Acme Investment Company, an Oregon Corporation, Respondent. Notice of Filing Petition for Review.

[Endorsed]: No. 4358. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of Sun Drug Company, Bankrupt. R. L. Sabin, as Trustee in Bankruptcy of the Sun Drug Company, Petitioner, vs. Acme Investment Company, a Corporation, Respondent. Petition for Revision Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in

Matter of Law, an Order of the United States District Court for the District of Oregon.

Filed October 13, 1924.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

In the Matter of SUN DRUG COMPANY, Bank-
rupt.

R. L. SABIN, as Trustee in Bankruptcy of the
SUN DRUG COMPANY,
Petitioner,

vs.

ACME INVESTMENT COMPANY, a Corpora-
tion,
Respondent.

**TRANSCRIPT OF RECORD IN SUPPORT
OF PETITION FOR REVISION**

Under Section 24b of the Bankruptcy Act of Con-
gress, Approved July 1, 1898, to Revise, in
Matter of Law, an Order of the
United States District Court for
the District of Oregon.

NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD.

SIDNEY TEISER, Morgan Building, Portland,
Oregon,

For the Trustee of the Estate of the Above-
named Bankrupt.

BRICE and BRAZELL, Yeon Building, Portland,
Oregon,

For Acme Investment Company.

In the District Court of the United States for the
District of Oregon.

July Term, 1924.

BE IT REMEMBERED, that on the 14th day
of August, 1924, there was duly filed in the District
Court of the United States for the District of Ore-
gon, a certificate of the Referee in Bankruptcy for
review of an order of the said Referee, in words and
figures as follows, to wit: [1*]

*Page-number appearing at foot of page of original certified Tran-
script of Record in Support of Petition for Revision.

In the District Court of the United States for the
District of Oregon.

No. 7234.

In the Matter of SUN DRUG COMPANY, Bank-
rupt.

CERTIFICATE ON PETITION TO REVIEW
ORDER DISALLOWING CLAIM OF ACME
INVESTMENT CO.

The undersigned Referee in Bankruptcy hereby certifies that an order was made July 14th, 1924, denying petition or claim of Acme Investment Company for rent of its premises, occupied by the trustee during the period in which the trustee was engaged in disposing of the stock of merchandise belonging to the bankrupt. Said petitioner, Acme Investment Company, conceiving itself to be aggrieved by the making of said order, filed its petition for review, which was allowed, and the question for decision is the legality of the order made.

Inasmuch as the findings and conclusions of the undersigned are fully set forth in the order itself, which accompanies this certificate, it is not deemed necessary to restate them here. I hand up herewith as the record, petition for review, the order under review, and exhibits filed, being a certain notice to quit, and the lease under consideration.

Respectfully submitted under date of August 13,
1924.

A. M. CANNON,
Referee in Bankruptcy.

Notice of the filing of the foregoing certificate on review mailed to Brice & Brazell, Yeon Building, and to Sidney Teiser, Morgan Building, on this 14th day of August, 1924.

G. H. MARSH,
Clerk.

Filed August 14, 1924. G. H. Marsh, Clerk. [2]

AND AFTERWARDS, to wit, on the 18th day of July, 1924, there was duly filed with the Referee in Bankruptcy, and on August 14, 1924, there was duly filed in said court, attached to the foregoing certificate, a petition for review of the order of the Referee in Bankruptcy, in words and figures as follows, to wit: [3]

In the District Court of the United States for the
District of Oregon.

In the Matter of SUN DRUG COMPANY, Bankrupt.

PETITION TO REVIEW REFEREE'S ORDER.
To the Honorable A. M. CANNON, Referee in
Bankruptcy:

Acme Investment Company, an Oregon corporation, respectfully files this, its petition and shows:

That prior to February 1st, 1923, Acme Investment Co. leased to the above-named bankrupt the premises at 351 Washington Street, Portland, Oregon, for a ten year period beginning February 1st, 1923, at a monthly rental of \$1,045.00 for the first

five years and \$1,195.00 for the last five years of the term.

That thereafter and on September 23d, 1923, Sun Drug Co., lessee as aforesaid, filed a voluntary petition in bankruptcy and was adjudicated a bankrupt.

Thereafter your petitioner, Acme Investment Co., filed a claim in the sum of \$977.60 with and against the Trustee of Sun Drug Co., a corporation, Bankrupt, for rent accruing during the time the Receiver and Trustee were in possession of the premises.

That thereafter and on July 14, 1924, Referee in Bankruptcy made an order denying said petition and disallowing said claim for rent, a copy of which order is hereto annexed. That said order was made and entered herein on July 14th, 1924.

That such order was and is erroneous in that the petition of Acme Investment Co. should have been granted and its claim for rent in the sum of \$977.60 should have been allowed.

WHEREFORE, your petitioner, feeling aggrieved because of such order, prays that the same may be reviewed as provided in the Bankruptcy Act of 1898 and General Order No. XXVII.

Dated at Portland, Oregon, July —, 1924.

ACME INVESTMENT CO.

By G. CELSI,
President. [3½]

State of Oregon,
County of Multnomah,—ss.

I, Geo. Celsi, being first duly sworn, on oath depose and say:

That I am president of Acme Investment Co., a

corporation, the petitioner named in the foregoing petition, that I have read the foregoing petition and that the same is true and correct.

G. CELSI.

Subscribed and sworn to before me this — day of July, 1924.

[Seal]

EDWARD J. BRAZELL,

Notary Public for Oregon.

My commission expires September 6, 1924.

State of Oregon,

County of Multnomah,—ss.

Due service of the within petition to review Referee's order, together with a copy thereof duly certified to be such by Edward J. Brazell, one of petitioner's attorneys, is hereby admitted at Portland, Oregon, this 18th day of July, 1924.

SIDNEY TEISER,

Attorney for Trustee in Bankruptcy of Sun Drug Co.

Filed July 18, 1924. A. M. Cannon, Referee in Bankruptcy.

Filed August 14th, 1924. G. H. Marsh, Clerk.
[4]

AND, to wit, on the 14th day of July, 1924, there was duly filed with the Referee in Bankruptcy, and on August 14, 1924, there was duly filed in said court, the decision and order of the Referee in Bankruptcy, in words and figures as follows, to wit: [5]

In the District Court of the United States for the
District of Oregon.

In the Matter of SUN DRUG COMPANY, Bank-
rupt.

DECISION AND ORDER UPON PETITION
OF ACME INVESTMENT COMPANY.

There is an objection by the trustee to the petition of the Acme Investment Company for rent during the time the trustee was in possession of the premises in the course of administration. The agreed facts in the dispute are that a few months before this failure a real estate agent procured the Sun Drug Company as a tenant for the Acme Investment Company at a total rental of \$141,000 over a ten-year period which would be at the rate of \$1,180 per month. Before the lease was signed it was agreed that said total rent of \$141,000 should be so distributed as that \$6,600 should be deducted or paid at the signing of the lease and that the balance of \$134,400 should be paid during the term at the rate of \$1,045 for the first five years and \$1,195 for the last five years, thus completing the total contract of \$141,000. It was conceded at the hearing that the purpose of the parties in thus disposing of the consideration was to secure to the lessor the faithful performance of the lease by the Sun Drug Company.

The lease itself, after the formal parts, covers the subject in this language:

“Now therefore, in consideration of the sum of Five Thousand (\$5,000.00) Dollars in cash and the promissory note of the Lessee in favor of the Lessor due April 15th, 1923, in the sum of Sixteen Hundred (\$1,600.00) Dollars, the receipt of said cash and note being hereby acknowledged by the Lessor, and in further consideration of the rentals herein reserved, and of the covenants herein contained on the part of the Lessee, to be paid and to be kept and faithfully performed by it, said Lessor does hereby lease, demise,” etc.

Prior to the filing of the petition in bankruptcy, as shown by the exhibits in the case, the Acme Investment Company cancelled this lease and notified the tenant to quit. And the question therefore is, is the landlord entitled to retain the \$5,000 cash paid under the aforesaid circumstances plus the [6] monthly rentals it received or is the trustee entitled to receive the \$5,000 back from the landlord?

I think the true rule is that the intention of the parties should and must govern and that this intention as gathered from all these circumstances, was to the effect that the \$5,000 in cash received at the date the lease was signed was a part of the total lease contract paid in advance as a deposit to secure to the landlord the faithful performance of the lease. This is certainly so if it is permissible to inquire into the real purpose of the parties in coming to such an agreement and making and receiving this payment. As to this I think it requires no citation of authorities to justify the conclusion

that the true consideration may always be inquired into; that it always may be shown there was no consideration at all for the making of a contract or that the consideration was actually more or less than that stated; and especially is this so where the controversy is confined to the original parties to the contract. Hence, in this case, if the \$5,000 was not actually paid as a consideration for the making of the lease, but was paid as rent in advance, I think that fact may be shown and considered by the court notwithstanding the express language of the lease. This seems to be the rule recognized by the Supreme Court of the State of Oregon; *Alvor vs. Banfield*, 85 Oregon, 49; *Moumal vs. Parkhurst*, 89 Oregon, 248; *Yuen Suey vs. Fleishman*, 65 Oregon, 606.

In my opinion the \$5,000 paid as related was a mere deposit for security; title to the same did not pass from lessor to lessee, and to permit its retention now would be to allow the enforcement of a penalty for breach of the contract. It was paid by agreement as rent in advance to secure faithful performance and was not given in consideration of the granting of the lease itself. Hence for the landlord to retain it and at the same time annul the lease constitutes a forfeiture or penalty. [7]

The effect of the rule in *Alvord vs. Banfield*, *supra*, is that the Court will look to the real intention of the parties to determine whether there has been a deposit for the faithful performance of the lease even though the language of the lease itself tends to indicate the contrary and, if it is

found that there was such deposit, the retention of the money secured under such circumstances will be regarded as a penalty or forfeiture and upon termination of the lease by the landlord he must pay back the money deposited.

“As a general rule the intention of the contracting parties is an important, if not a conclusive element in determining whether a sum stipulated to be paid in case of the breach of the contract is to be regarded as liquidated damages or a penalty. Modern authorities attach greater importance to the meaning and intention of the parties than to the language of the clause designating the sum as a penalty or as liquidated damages: *Salem vs. Anson*, 40 Or. 339 (67 Pac. 190, 91 Am. St. Rep. 485, 56 L. R. A. 169); *Wilhelm vs. Eaves*, 21 Ord. 194 (27 Pac. 1053, 14 L. R. A. 297). The tendency and preference of the law is to regard the stipulation or covenant as of the nature of a penalty rather than as liquidated damages for the reason that then it may be apportioned to the actual loss sustained and compensation for such loss is the full measure of right and justice. Where the circumstances and the nature of the stipulation are such that the actual damages are not ascertainable with any degree of certainty the rule stated does not apply. If there is an agreement for a fixed, unvarying sum, without regard to the date of the breach, when in the very nature of things the date of the breach would be all important

in determining the element of actual damages, the stipulation must be held to be one for a penalty; 8 R. C. L., sec. 114, p. 564; note, Ann. Cas. 1912C, p. 1025. In Section 115 of 8 R. C. L., p. 567, the author states:

“ ‘In other words, the damages stipulated for must be such as to amount to compensation only, and if the principle of compensation has been lost sight of the sum named will be treated as a penalty.’ ”

The case of *Dutton vs. Christie*, 115 Pac. 856, and other cases of same tenor, are relied upon to justify claimant's position, but the report of none of the cases cited show circumstances like those here. In none of them was there a claim and admission, as here, that the payment was integral part of the whole sum to be paid as rent during the occupancy of the premises, and this sufficiently distinguishes this case from those. There is no claim here that the lessee erected this [8] building at the instance of the lessor or was induced to do so by the promise of this payment or that it has suffered any disadvantages or losses. Hence it seems to me that a court should hesitate long before permitting the retention of so large a sum for no consideration at all, unless clearly obliged to do so by the strict terms of their contract. For an occupancy of less than five months the landlord in this case has received more than \$10,000, or twice what was agreed when they sat down to make their contract. That construction of the contract which

will relieve the lessee of such a penalty ought to be adopted.

The petition is disallowed. .

Dated at Portland, Oregon, July 14, 1924.

A. M. CANNON,
Referee in Bankruptcy.

Filed July 14, 1924. A. M. Cannon, Referee in Bankruptcy.

Filed August 14, 1924. G. H. Marsh, Clerk. [9]

AND AFTERWARDS, to wit, on the 14th day of August, 1924, there was duly filed in said court, attached to the foregoing certificate, a certain notice, in words and figures as follows, to wit:
[10]

NOTICE.

July 28th, 1923.

Sun Drug Company,
Portland, Oregon.

Gentlemen:

You are hereby notified that you have violated the terms and conditions in that certain lease dated the 15th day of February, 1923, wherein you agreed to pay certain rents on the premises known as Lot 2, Block 1, Park Block, City of Portland, and by reason of the broken conditions and terms thereof, you are hereby notified that the said lease under which you are holding is hereby cancelled; you are therefore notified to deliver up the premises on or before the first day of August, 1923.

Dated this 28th day of July, 1923.

ACME INVESTMENT CO.

By G. CELSI, Pres.

Filed August 14 1924. G. H. Marsh, Clerk. [11]

AND AFTERWARDS, to wit, on the 14th day of August, 1924, there was duly filed in said court attached to the foregoing certificate a lease, in words and figures as follows, to wit: [12]

LEASE.

THIS INDENTURE, made this — day of February, 1923, by and between ACME INVESTMENT CO., a corporation, of Portland, Oregon, hereinafter called the lessor, and SUN DRUG CO., a corporation, of Portland, Oregon, hereinafter called the Lessee, WITNESSETH—

WHEREAS, the Lessor is now constructing a two-story building on,—

Lot Two (2), Block One (1), Park Block, in the City of Portland, Oregon, being a piece of ground fifty (50) feet by One Hundred (100) feet in size, fronting fifty (50) feet on Washington Street and one hundred (100) feet on Park Street. And,—

WHEREAS the Lessee desires to rent from the Lessor the corner store of said premises, said store having a width of approximately seventeen (17) feet on Washington Street and a depth of about fifty-five (55) feet on Park Street, and being known

as number 361, Washington Street, Portland, Oregon. And,—

WHEREAS, the Lessor has agreed to rent such store upon the terms, covenants, and conditions hereinafter mentioned.

NOW, THEREFORE, in consideration of the sum of Five Thousand (\$5,0000.00) Dollars in cash and the promissory note of the Lessee in favor of Lessor due April 15th, 1923, in the sum of Sixteen Hundred (\$1600.00) dollars, the receipt of said cash and note being hereby acknowledged by the Lessor, and in further consideration of the rentals herein reserved, and of the covenants herein contained on the part of the Lessee to be paid and to be kept and faithfully performed by it, said Lessor does hereby lease, demise, “etc. and let unto said Lessee that certain store known as number [13] 361 Washington Street, in the City of Portland, Oregon, being a space approximately seventeen (17) feet in width on Washington Street and fifty-five (55) feet in depth on Park Street.

TO HAVE AND TO HOLD the said premises hereby demised unto the said Lessee for the full term of ten (10) years beginning March 1st, 1923, and ending February 28th, 1923, said Lessee paying and yielding as rental therefor the full sum of One Hundred Thirty-four Thousand Four Hundred (\$134,400.00) Dollars, payable in Gold Coin of the United States of the present standard weight and fineness as follows: The advance monthly rental on One Thousand Forty-five (\$1,045.00) Dollars during the first five (5) years of this lease and the

advance monthly rental of One Thousand One Hundred Ninety-five (\$1,195.00) Dollars per month during the last five (5) years of this lease, the first month's rent to be paid on March 1st, 1923, and thereafter each month's rent to be paid in advance on the first day of each and every month during said term.

Said Lessee in consideration of the leasing of said premises and the agreements herein contained does hereby expressly covenant to and with the Lessor, its successors and assigns as follows:

I. That said Lessee will pay the said Lessor said specified rentals for the full term of this lease monthly in advance in the manner aforesaid.

II. That the Lessee will make no unlawful, improper, or offensive use of said premises, and will at the expiration of said term, or upon any sooner determination thereof, without notice, quit and deliver up said premises and all future erections or additions to or upon the same, to the said Lessor, or those having its estate [14] in the premises, peaceably, quietly, in as good order and condition (reasonable use and wearing thereof, fire and other unavoidable casualties excepted) as the same shall be when completed or may hereafter be placed by the Lessor.

III. That the said Lessee will not suffer nor commit any strip or waste of the premises, or make or permit any alterations, changes or additions in or to said premises without first obtaining the written permission of the Lessor; that said Lessee will, at its own expense, pay for all alterations,

changes, or additions that may be made as aforesaid; that it will keep and maintain said premises in good condition and repair at its own expense, making the same at all times to comply with the city ordinances of the City of Portland, or other regulations thereof as they may now or hereafter exist.

IV. That the said Lessee will not assign, transfer, mortgage, pledge, hypothecate, sublet, or otherwise encumber or dispose of this lease, or the estate hereby created in the lessee, or any interest in any portion of the same, nor permit any other person or persons to occupy the same, without the written consent of the Lessor being first obtained in writing.

V. That this lease is personal to the Lessee, and its interest therein, or any part thereof, cannot be sold, assigned, transferred, encumbered, seized, or taken by operation of law, or for, under, or by virtue of an execution, or other process or attachment or proceedings instituted against the Lessee, or under or by virtue of any bankruptcy or insolvency proceedings had in regard to the Lessee, or in any other manner.

VI. That the said Lessee will indemnify and save harmless the said Lessor against any loss or damage for [15] injury to persons or property caused by the use or occupancy of said premises by said Lessee, and that said Lessee will keep said premises, and every part thereof, free and clear of all liens for labor and material of any kind during the term hereof.

VII. That the Lessee will keep the plumbing, wiring, and water pipes in good condition and repair and the sidewalks in front of said premises clear of ice and snow; and that said Lessee will also pay for all light, heat, and hot water; it being understood that the Lessor is to furnish cold water and nothing else.

VIII. That the said Lessee will, at all reasonable times, permit and allow said Lessor, and those representing it or having its estate in the premises, to enter into and upon the same, or any part thereof, and examine the condition thereof.

IX. The said Lessee will, during the term of this lease, use and occupy said leased premises only for the following purposes, to wit: to manufacture, purchase, and sell drugs, apothecaries, general drug-store merchandise, and tobaccos, and to conduct a soda fountain business.

X. That said Lessee will carry plate-glass insurance in a sufficient sum to fully protect all the plate glass in the windows of said premises, loss in any, under said policies to be made payable to said Lessor to guarantee the repair or replacement of the same, the policies of said insurance to be delivered to the Lessor.

XI. That in the event any action, suit or proceeding being brought to collect the rent due, or to become due hereunder, or any portion thereof, or to gain possession of said premises, or to enforce compliance with any of the covenants of this lease, or for failure to observe any of the [16] covenants of this lease, said Lessee will pay to the Lessor

such sum as the Court may adjudge reasonable as attorney fees to be allowed in such suit, action or proceeding.

XII. That in case said store, or any part thereof, shall at any time be destroyed or so damaged by fire as to be unfit for occupancy and use the rent shall abate according to the nature and extent of the damage sustained, until said premises shall have been rebuilt or reinstated and made fit for occupancy and use, such repairs to be made by the Lessor.

XIII. It is covenanted and agreed that the Lessee will not suffer or permit any name or other advertising sign or device to be placed, installed, or exhibited on the exterior of the leased premises without first submitting the same to the Lessor and obtaining its approval thereof.

XIV. In the event Lessee should hold over and remain in possession of said premises after the expiration of this lease, without any written lease being actually made, such holding over shall not be deemed to operate as a renewal or extension of this lease, but shall only create a tenancy from month to month, which may be terminated at any time by the Lessor.

That Lessor hereby agrees that during the terms of this lease it will not permit any other person or tenant to conduct a drug store in any part of the building of which the leased premises are a part.

It is understood that the Lessor has leased all of Lot Two (2), Block One (1), Park Block, in the City of Portland, Oregon, from August Berg

under lease dated December 1st, 1922, and that the Lessee derives no greater right [17] hereunder than the Lessor does under and by virtue of said lease from August Berg, reference to which is hereby expressly had, and it is further understood that the Lessee's rights hereunder are subject to the rights of August Berg, Lessor, in the said lease hereinbefore mentioned.

PROVIDED ALWAYS, and these presents are upon this condition that if the Lessee shall be in arrears in the payment of rent for the period of five days, or if said Lessee shall fail to neglect to do or perform or observe any of the covenants contained herein, on its part to be kept and performed, or if said Lessee shall be declared bankrupt or insolvent according to law, or if any assignment of its property shall be made for the benefit of creditors, then and in either of said cases or events, the Lessor, or those having its estate in the premises, lawfully may, at his or their option, immediately or at any time thereafter, without demand or notice, enter into and upon said premises, or any part thereof, in the name of the whole, and repossess the same as of his or their former estate, and expel said Lessee and those claiming by, through or under it, and remove its effects (forcible, if necessary), without being taken or deemed guilty of trespass, and without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant; and upon entry as aforesaid this lease shall determine; and said Lessee covenants that in case of such termination

it will indemnify said Lessor against all loss of rent which it may incur by reason of such termination during the residue of the term above specified. Any waiver of any breach of any covenant or condition herein contained to be kept and performed by Lessee shall not be deemed or considered a continuing waiver and shall not operate to bar or prevent Lessor from declaring [18] a forfeiture for any succeeding breach, whether of same condition or covenant, or otherwise.

IN WITNESS WHEREOF, Acme Investment Co., pursuant to resolution of its Board of Directors, has caused these presents to be executed by its President, and its corporate seal to be hereto attached; and the Lessee does likewise cause these presents to be executed by its President and its corporate seal to be hereto affixed by its Secretary in duplicate the day and year first above written.

ACME INVESTMENT CO.,

By G. CELSI, [Seal]
President.

By N. H. McEACHERN,
Secretary.

SUN DRUG CO.,

By H. J. GIER,
President.

By S. M. INKSTER, [Seal]
Secretary.

Executed in the presence of:

EDWARD J. BRAZELL.

R. O. DOWNEY.

Filed August 14, 1924. G. H. Marsh, Clerk.
[19]

AND AFTERWARDS, to wit, on the 29th day of September, 1924, there was duly filed in said court an opinion, in words and figures as follows, to wit: [20]

In the District Court of the United States for the District of Oregon.

In re SUN DRUG COMPANY, Bankrupt.

OPINION.

Portland, Oregon, September 29, 1924.

Memorandum by BEAN, District Judge:

In February, 1923, the Acme Investment Company let to the Sun Drug Company certain premises in the city of Portland for a term of ten years. The lease, after the formal parts thereof recites that

“Now therefore, in consideration of the sum of five thousand dollars in cash, and promissory note of the lessee in favor of the lessor, dated April 15, 1923, in the sum of \$1600.00, the receipt of said cash and note being hereby acknowledged by the lessor, and in further consideration of the rents herein reserved, and of the covenants herein contained on the part of the lessee, to be paid and to be kept and faithfully performed by it, said lessor does hereby lease, demise and let unto said lessee” certain described premises “for the full term

of ten years beginning March 1, 1923, and ending February 28, 1933, said lessee paying and yielding as rental therefor the full sum of \$134,000.00 in gold coin of the United States of the present standard weight and fineness, as follows: The advance monthly rental of \$1045.00 during the first five years of this lease, and the advance monthly rental of \$1195.00 per month during the last five years."

On August 24, 1924, the Sun Drug Company was adjudged a bankrupt. The lessor presented a claim for rental during the time the premises were occupied by the receiver or trustee in bankruptcy. Its allowance was denied by the referee on the ground that the five thousand dollars paid the lessor at the making of the lease was a mere security for performance of the conditions thereof by the lessee.

The law is that where, upon the making of a lease, money is deposited or advanced by the lessee as security for the performance of the covenants on his part to be performed, the lessee or his successor in interest is entitled at the termination of the lease to a return of the money less the damages. (*Alvord vs. Banfield*, 85 Or. 9; *Moumal vs. Parkhurst*, 89 Or. 248; *Yuen Suey vs. Fleshman*, 65 Or. 606.) But if the money is paid as a bonus or consideration to the lessor for the making of the lease, the lessee is not entitled to the return. (*Dillon vs. Christie*, 115 Pac. 856; *Barrett vs.* [21] *Munro*, 124 Pac. 369; *Hilyers vs. Eggers*, 164 Pac. 26; *Curtis vs. Arnold*, 184 Pac. 510.)

Now, in this case, the language of the lease in my

judgment is plain and unambiguous. There is no room for construction. It recited that in consideration of the payment of the money and the performance of the other covenants of the lease the lessee shall be entitled to the possession of the premises. There is no statement or intimation that the money was intended as security or as a guaranty or as a penalty, or as liquidated damages, but it is recited that it was as a consideration for the making of the lease.

Of course in this as in all cases involving the construction of a written contract, the intention of the parties must govern, but their intention is to be ascertained from the language used by them. The court cannot make contracts for parties, nor can it relieve them from lawful engagements deliberately and knowingly entered into.

No evidence was taken at the hearing before the referee, but he reports that it was admitted that a real estate agent procured the bankrupt as a tenant for the investment company at a total rental of \$141,000 for the ten-year period, but before the lease was signed it was agreed that \$6600.00 of the rental should be deducted or paid at the beginning of the lease, and the balance at the rate of \$1045.00 per month for the first five years, and \$1195.00 per month for the remainder of the term, and that such arrangement was intended to secure for the lessor the faithful performance of the terms by the lessee. If there were such negotiations or arrangements between the agent and the lessee, they were merged in the written instrument which evi-

dences the contract or agreement between the parties and by which their rights and liabilities are to be measured. Parol evidence is inadmissible to alter, vary or contradict its terms. (Northern Assurance Co. vs. Building Assn., 183 U. S. 308).

It is claimed that because the lessee was adjudged a [22] bankrupt a few months after the making of the lease it would be unjust and unconscionable to permit the lessor to retain the money paid as a consideration for the lease, but this affords no reason why the Court should disregard or decline to enforce the plain provisions of the contract.

It follows that the ruling of the referee should be reversed and the claim of the lessor allowed.

Filed September 29, 1924. G. H. Marsh, Clerk.
[23]

AND AFTERWARDS, to wit, on the 29th day of September, 1924, there was duly filed in said court an order reversing the order of the Referee in Bankruptcy, in words and figures as follows, to wit: [24]

In the District Court of the United States for the
District of Oregon.

In the Matter of SUN DRUG CO., Bankrupt.

ORDER TO PAY CLAIM OF ACME INVESTMENT CO.

The petition to review the order of the Referee

in Bankruptcy in the matter of the claim of Acme Investment Co. in the sum of \$977.60 for rent accruing during the time the Receiver and Trustee were in possession of certain leased premises, came on regularly for hearing, and the Court having fully considered the matter and being fully advised in the premises, it is hereby,—

ORDERED that the order of the Referee in Bankruptcy in the matter of said claim be reversed and that the Trustee of Sun Drug Co., Bankrupt, be ORDERED to pay said claim.

Dated, September 29th, 1924.

R. S. BEAN,
Judge.

Filed September 29, 1924. G. H. Marsh, Clerk.
[25]

AND AFTERWARDS, to wit, on the 28th day of October, 1924, there was duly filed in said court, a Claim of Acme Investment Company, in words and figures as follows, to wit: [26]

In the Matter of SUN DRUG COMPANY, Bankrupt.

R. L. SABIN, Trustee, Dr.

to

ACME INVESTMENT CO.

CLAIM OF ACME INVESTMENT COMPANY.

September 22, 1923. For rent of premises at 351 Washington Street, Portland, Oregon, from August 24th to September 22d, 1923, 29 days at a rental of \$1045.00 per month\$977.60

State of Oregon,
County of Multnomah,—ss.

N. H. McEachern, being first duly sworn, deposes and says:

That I am the treasurer of Acme Investment Co., a corporation, the claimant in the foregoing claim, and that the Trustee of Sun Drug Co., Bankrupt, is justly indebted to the Acme Investment Co. in the sum of \$977.60 for rent of premises at 351 Washington Street, Portland, Oregon, from August 24, 1923, to September 22d, 1923.

N. H. McSACHERN.

Subscribed and sworn to before me this 2d day of October, 1923.

[Seal]

C. F. KETTLEBERG,
Notary Public for Oregon.

My commision expires May 13, 1927.

Filed October 28, 1924. G. H. Marsh, Clerk.

AND, to wit, on the 9th day of October, 1924, there was duly filed in said court a praecipe for transcript, and stipulation, in words and figures as follows, to wit: [28]

In the District Court of the United States for the District of Oregon.

In the Matter of SUN DRUG COMPANY, Bankrupt.

PRAECIPE FOR TRANSCRIPT, AND STIPULATION.

To the Clerk of the District Court of the United States for the District of Oregon.

Please make transcript of the following papers in the above-entitled matter, which, together with the petition of Trustee to review and notice of appeal, shall constitute a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit in the above matter upon petition for review by R. L. Sabin, Trustee in bankruptcy of the Sun Drug Company, petitioner, against Acme Investment Company, a corporation, respondent:

1. Petition of the Acme Investment Company for rent of premises occupied by Receiver and Trustee during administration.
2. Referee's certificate on petition to review and order disallowing claim of Acme Investment Company, which certificate includes,
(a) Petition to review Referee's order.

- (b) Decision and order upon petition of Acme Investment Company.
 - (c) Letter of Acme Investment Company to the Sun Drug Company cancelling lease.
 - (d) Lease between Acme Investment Company and Sun Drug Company.
3. Memorandum opinion of Honorable Robert S. Bean upon review.
 4. Order of United States District Court for the District of Oregon filed September 29, 1924, reversing order of Referee.
 5. This praecipe.
 6. The stipulation following.

SIDNEY TEISER,

Attorney for Trustee and Petitioner. [29]

It is stipulated between the petitioner herein and respondent herein, thru their respective counsel, that the documents and papers mentioned in the above praecipe, together with the petition of Trustee to review filed in the United States Circuit Court of Appeals for the Ninth Circuit and the notice of filing said petition for review likewise followed in said Circuit Court of Appeals for the Ninth Circuit, shall constitute the transcript of record upon appeal herein and all of the same.

Dated at Portland, Oregon, this 9th day of October, 1924.

SIDNEY TEISER,

Attorney for Petitioner.

BRICE & BRAZELL,

Attorneys for Respondent.

United States of America,
 State of Oregon,
 County of Multnomah.

Due service of the within praecipe is hereby accepted in Multnomah County, Oregon, by receiving a copy thereof duly certified.

_____,
 Attorney for Acme Investment Company.
 October 9, 1924.

Filed October 9, 1924. G. H. Marsh, Clerk.
 [30]

AND AFTERWARDS, to wit, on the 20th day of October, 1924, there was duly filed in said court an order fixing time to file transcript in the United States Circuit Court of Appeals for the Ninth Circuit, in words and figures as follows, to wit: [31]

In the District Court of the United States for the District of Oregon.

No. B.—7234.

October 20, 1924.

In the Matter of SUN DRUG COMPANY, Bankrupt.

ORDER FIXING TIME TO FILE TRANSCRIPT OF RECORD.

It appearing to the Court that the trustee of the above-named bankrupt has filed in the United

States Circuit Court of Appeals for the Ninth Circuit a petition to review the order of this court filed September 29, 1924. It is ordered that the said trustee is hereby directed to file the transcript of record from this court, upon which the said order was based in the said Court of Appeals on or before October 30, 1924.

R. S. BEAN,
Judge.

Filed October 20, 1924. G. H. Marsh, Clerk.
[32]

AND AFTERWARDS, to wit, on the 30th day of October, 1924, there was duly filed in said court an order extending the time to file transcript of record in the United States Circuit Court of Appeals, in words and figures as follows, to wit: [33]

In the District Court of the United States for the District of Oregon.

No. B.—7234.

October 30, 1924.

In the Matter of the SUN DRUG COMPANY,
Bankrupt.

ORDER EXTENDING TIME TO AND INCLUDING NOVEMBER 6, 1924, TO FILE TRANSCRIPT OF RECORD.

Now, at this day, for good cause shown, IT IS

ORDERED that the time for filing the transcript of record in this cause and docketing the same in the United States Circuit Court of Appeals for the Ninth Circuit, be, and the same is hereby extended to and including November 6, 1924.

R. S. BEAN,
Judge.

Filed October 30, 1924. G. H. Marsh, Clerk.
[34]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that I have prepared the foregoing transcript, pursuant to the direction of the foregoing praecipe for transcript, and that the foregoing pages numbered from 1 to 34, inclusive, constitute the transcript of record in the cause in bankruptcy in said court in which the Sun Drug Company was the adjudged bankrupt and the Acme Investment Company is a creditor and that the foregoing pages contain a full, true, and complete transcript of the record and proceedings had in said court in said cause which the said praecipe directs shall be included therein as the same appears of record and on file at my office and in my custody.

I further certify that the cost of the foregoing transcript is \$8.45, and that the same has been paid by the trustee of the said bankrupt.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Portland, in said district, this 31st day of October, 1924.

[Seal]

G. H. MARSH,
Clerk. [35]

[Endorsed]: No. 4358. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of Sun Drug Company, Bankrupt. R. L. Sabin, as Trustee in Bankruptcy of the Sun Drug Company, Petitioner, vs. Acme Investment Company, a Corporation, Respondent. Transcript of Record in Support of Petition for Revision Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, an Order of the United States District Court for the District of Oregon.

Filed November 3, 1924.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

